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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	92055020
Party	Plaintiff Tech Data Corporation
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Date	01/08/2013
Attachments	Reply to Supplemental Affirmation.pdf (8 pages)(218394 bytes)

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

In the Matter of Registration No. 3,553,646
Registered December 30, 2008
Mark: STREAMONE and Design

TECH DATA CORPORATION,

Petitioner,

v.

STREAMONE LLC,

Respondent.

Cancellation No. 92055020

**PETITIONER'S REPLY TO RESPONDENT'S
SUPPLEMENTAL AFFIRMATION**

Pursuant to Rule 2.120(g) of the Trademark Rules of Practice and 37 C.F.R. § 2.120(g), and TBMP § 527.01(a), Petitioner Tech Data Corporation ("Tech Data" or "Petitioner"), by its attorneys, Moses & Singer LLP, hereby replies to the Supplemental Affirmation of Kenneth F. McCallion, counsel for Respondent StreamOne LLC ("Respondent"), dated December 24, 2012 ("McCallion Supplemental Affirmation"), as new facts are raised in the McCallion Supplemental Affirmation. Tech Data requests that its motion for an order entering sanctions, in the form of entry of judgment sustaining the opposition, be granted as Respondent has failed to comply with the Board's Order dated October 22, 2012 (the "Order").

FACTUAL BACKGROUND

Tech Data refers to its (1) Motion to Compel Discovery, dated August 16, 2012, (2) Motion for Entry of Sanctions in the Form of Entry of Judgment, dated November 12,

2012, and (3) Reply to Respondent's Affirmation Responding to Petitioner's Motion for Entry of Sanctions in the Form of Entry of Judgment, dated December 6, 2012, as well as the respective supporting affidavits, already part of the record in this action, for the factual background.

ARGUMENT

For every paper that Respondent has failed to serve and file in a timely fashion, Respondent's counsel has a new excuse. Respondent now appears to claim that it just realized it did not provide its initial disclosures that were due in May 2012, and its responses to Petitioner's Interrogatories that were due in July 2012, blaming a former employee for failing to properly file the documents. *See* McCallion Supplemental Affirmation ¶ 3.¹ Respondent now asks the Board to accept its late initial disclosures, as well as its late Responses to Petitioner's First Set of Interrogatories that the Board ordered Respondent to provide by November 8, 2012. Respondent's submission is silent as to why these late responses were not served in May or July when they were due, or why Respondent did not respond to Petitioner's Motion to Compel Discovery of August 16, 2012, or any of the reminder communications sent previously.

It is unclear whether Respondent intended to include the initial disclosures with its submission of November 16, 2012, as there is no reference to the initial disclosures in that submission. *See* Affirmation of Kenneth F. McCallion, dated November 16, 2012, already part of the record ("November 16 McCallion Affirmation"). Most strangely, the initial disclosures attached to the McCallion Supplemental Affirmation are dated June 7,

¹ Presumably Respondent means it failed to *serve* rather than it failed to *file* the initial disclosures and responses to Petitioner's First Set of Interrogatories, as discovery is not filed with the Board. No electronic filing was required. *See* 37 C.F.R. § 2.120(j)(8).

2012. This suggests that the responses have been sitting around for months and Respondent has suddenly realized that they were never served. It is remarkable that Respondent's counsel would realize the day before Christmas (the McCallion Supplemental Affirmation is dated December 24, 2012²) that the June-dated initial disclosures were not served, especially given the number of communications made and papers served in this proceeding that specifically refer to and set forth arguments based on the fact that Respondent had failed to serve its initial disclosures as required. *See* Affidavit of Deborah Shapiro dated August 16, 2012, in support of Petitioner's Motion to Compel Discovery, ¶ 9 and Ex. C (e-mail from Petitioner's counsel to Respondent's counsel dated August 9, 2012); Affidavit of Deborah Shapiro in Support of Petitioner's Motion for Entry of Sanctions in the Form of Entry of Judgment, dated November 12, 2012, ¶ 2; Affidavit of Deborah Shapiro dated December 6, 2012, in support of Petitioner's Reply to Respondent's Affirmation Responding to Petitioner's Motion for Entry of Sanctions in the Form of Entry of Judgment, ¶ 9. By way of example, in the e-mail communication to Respondent's counsel of August 9, 2012, attached as Exhibit C to the Affidavit of Deborah Shapiro dated August 16, 2012, in support of Petitioner's Motion to Compel Discovery, Petitioner's counsel states, "[t]he return date for our discovery requests has passed in this matter, and we have not heard from you. I note we did not receive your initial disclosures either." Furthermore, the Board's order of October 22, 2012, specifically required Respondent to provide its initial disclosures.

² It is also curious that the McCallion Supplemental Affirmation is dated December 24, 2012, but the envelope in which Petitioner received service of this submission has a postmark of January 2, 2012, nine days after the papers were "served." See attached Exhibit A.

Likewise, Respondent's responses to Tech Data's First Set of Interrogatories were due July 31, 2012, but are only now served with the McCallion Supplemental Affirmation. The failure to timely serve the interrogatory responses is claimed to be part of the same employee's filing mistakes, presumably as part of Respondent's submission on November 16. *See* McCallion Supplemental Affirmation ¶ 3. There is mention of Responses to Petitioner's First Set of Interrogatories in the November 16 McCallion Affirmation, though the interrogatory responses submitted with the McCallion Supplemental Affirmation are dated November 3, 2012. This is inconsistent with the facts stated in the November 16 McCallion Affirmation, where Respondent claims to have finalized its responses on November 5. Petitioner has already pointed to the other issues with the facts stated in the November 16 McCallion Affirmation in its papers of December 6.

The Board should not condone Respondent's behavior. The Board has rules and issues orders to ensure diligence in representation and the orderly prosecution of the proceedings before it. In order for the Board's rules and orders to have meaning, the Board must put an end to Respondent's shenanigans. The rules are clear: "The Board expects parties (and their attorneys or other authorized representatives) to cooperate with one another in the disclosure and discovery process, and looks with extreme disfavor on those who do not." TBMP § 401.06. Respondent was not diligent and did not cooperate in this matter. It should not be rewarded for its failures. Accepting Respondent's submissions would render the Board's orders meaningless and make a mockery of these proceedings, allowing a party to ignore the matter and just submit papers whenever it wants without consequence. Respondent had many chances to defend this action and did

not do so. Regardless of the excuses, the fact remains: Respondent's submission is still not timely and it did not comply with the Board's order. The Board has the authority to enter sanctions for the failure to comply with a Board order, 37 C.F.R. § 2.120(g), TBMP § 527.01(a), and the Board should do so here.

CONCLUSION

For the reasons set forth above, Tech Data requests an order for an entry of judgment sustaining the cancellation.

Dated: New York, New York
January 8, 2013

Respectfully submitted,

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EXHIBIT A



White Plains, NY 10610

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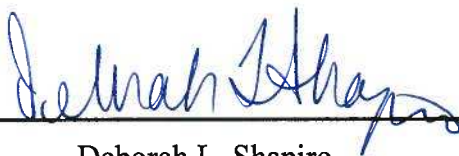
TO:

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CERTIFICATE OF SERVICE

I certify that on the 8th day of January, 2013, I caused a true copy of Petitioner's Reply to Respondent's Supplemental Affirmation to be served on counsel for Respondent StreamOne LLC, by sending same via first class mail to the following address:

Kenneth F. McCallion, Esq.
McCallion & Associates LLP
100 Park Avenue, 16th Floor
New York, NY 10017



Deborah L. Shapiro